

No. 10514

United States
Circuit Court of Appeals

For the Ninth Circuit.

KENNETH ALEXANDER,

Appellant,

vs.

LT. GENERAL JOHN L. DE WITT, Commanding
General of the United States Army of the West-
ern Defense Command and Fourth Army, and
R. B. HOOD, Special Agent in Charge of the
Federal Bureau of Investigation of the United
States Department of Justice located at Los
Angeles,

Appellees.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

In the District Court of the United States in and
for the Southern District of California, Central Division

No. 2909—PH Civil

KENNETH ALEXANDER,

Plaintiff,

vs.

LT. GEN. JOHN L. DeWITT, RANDELL LARSON, LT. COL., F. A., R. B. HOOD, Special Agent in Charge of Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California.

Defendants.

ORDER FOR SUPPLEMENTAL RECORD

Pursuant to Rule 75(h), Rules of Civil Procedure, and upon the suggestion of Charles H. Carr, United States Attorney, Attorney for the above-named defendants who are appellees on appeal of said case, and it appearing to this Court that the reporter's transcript of proceedings dated May 25, 1943 in said cause, material to the case of said appellees, has been omitted from the record on appeal by accident, and in order that the said record on appeal may truly disclose what occurred in the District Court;

It Is Therefore Ordered that the Clerk of the United States District Court, Southern District of California, correct said omission by a supplemental transcript to include the said reporter's transcript of proceedings dated May 25, 1943,

same to be certified and transmitted by the Clerk of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of October, 1943.

PEIRSON M. HALL

Judge of the United States
District Court.

Presented by:

JOHN M. GAULT

Assistant U. S. Attorney

[Endorsed]: Filed Oct. 20, 1943.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing two pages contain a full, true and correct copy of: Order for Supplemental Record, which together with the Original Reporter's Transcript transmitted herewith and the Transcript of Record heretofore transmitted to the Circuit Court of Appeals constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 21st day of October, 1943.

[Seal]

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk.

HEARING ON PLAINTIFF'S MOTION FOR
INJUNCTION PENDITE LITE, PUR-
SUANT TO NOTICE FILED MAY 18, 1943.

Los Angeles, California

May 25, 1943.

Appearances:

For the Plaintiff:

Lorin Andrews, Esq.,
326 West Third Street,
Los Angeles, California,
and

Avery M. Blount, Esq.,
311 South Spring Street,
Los Angeles, California.

For the Defendants:

Leo V. Silverstein, Esq.,
United States Attorney.

Amicus Curiae:

A. L. Wirin, Esq.,
257 South Spring Street
Los Angeles, California.

Before the Honorable Pierson M. Hall. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

Los Angeles California,
Tuesday, May 25, 1943.
9:30 A. M.

The Clerk: Alexander vs. DeWitt, hearing on plaintiff's motion for Injunction Pendente Lite, pursuant to notice filed May 18, 1943.

Mr. Andrews: Ready.

Mr. Silverstein: Ready.

Mr. Andrews: Shall I begin the proceeding on the motion, your Honor?

The Court: All right.

Mr. Andrews: Mr. Silverstein has a motion.

If the Court pleases, as your Honor knows, of course, from the pleadings, the action is for a permanent injunction against the military order of General DeWitt and certain other officers, and the motion before your Honor is asking that we have an injunction or restraining order pendente lite not to take this matter out of the jurisdiction of the Court until the case can be heard on its merits. As a matter of fact, there is no denial of the allegations of the complaint filed by the Government; therefore, in arguing this motion, we will take it, of course, for granted that the statements made in our complaint are correct; that here is a man who, without any notice of any charge against him, not knowing yet what he has been convicted of, with all the matters that are set forth there, the fact that he was not permitted counsel, he was not permitted the evidence against [2] him, he was not notified on what charge he

was tried, he was simply notified summarily that he had to leave certain States of the Southern and I believe Western and one other department, which are purely arbitrary departments which in the War had been set up as military divisions; but there was no military law; there is no martial law, the Courts are functioning, not only your Honor's Court, but every Federal Court and every State Court is functioning. If this man had violated the law in some particular, there was plenty of authority to bring him before the State Courts. The grand jury was in session, informations could be filed, he could be arraigned, and a great many remedies that any citizen of the United States has to protect himself from unjust accusation could be made. Here is a civil citizen, your Honor understands; he has nothing to do with the Military authorities whatsoever, or the Naval authorities, or any Government employees; he is just a citizen, like any of us here, and he is cited to appear before an arbitrary commission, and it is decided that he must leave by that commission, without giving him any of the rights that are protected by the Bill of Rights or the Amendments to the Constitution of the United States. As a matter of fact, the duties and rights of the President of the United States, which are set forth in Article II of the Constitution are limited by that order. He is not a dictator like some of our European authorities. We are in a Democracy and the [3] President has certain authorities that are given

him by the Constitution of the United States, and no other.

Now, it seems to me that the case sets itself on two points. Second, was the Military Commission that has taken upon itself to convict the plaintiff and order him out of the State of California a competent tribunal for the trial of the plaintiff; and, if it is not a competent tribunal, is our application to your Honor for a restraining order the proper remedy in the case, both the permanent and the temporary?

Now, if the Court pleases, I am going to make two propositions——

The Court: Just a moment, Mr. Andrews.

Mr. Andrews: ——that we strike out——

The Court: Oh, you are going to what?

Mr. Andrews: I am going to make two propositions in this matter. We strike out our second cause of action, which is a suit for damages. On discussion with the other counsel in the case, I ask leave to associate Mr. Avery Blount as attorney for the plaintiff in this case, and Mr. Wirin, who is appearing as *Amicus Curiae*.

Mr. Wirin: I am asking for permission to.

The Court: Permission is granted. Any objection?

Mr. Silverstein: No.

The Court: It is granted. I am like the Virginia Judge. I rule first. [4]

Mr. Andrews: I am going to strike that. I will ask permission to strike the second cause of action, for damages.

The Court: As well as the allegation in the first cause of action about the amount of damages?

Mr. Andrews: Actual damages, no, but the damages we set up——

The Court: All right, you strike the second cause of action?

Mr. Andrews: Yes.

The Court: That motion is granted.

Mr. Andrews: Now, there are one or two little corrections.

The Court: The point you made a moment ago—you said there were two points.

Mr. Andrews: Yes.

The Court: One whether or not the tribunal was lawfully created.

Mr. Andrews: Yes. Was it a tribunal that could try civilians?

The Court: Yes.

Mr. Andrews: There is no such thing in the Constitution of the United States providing for a military tribunal to try citizens; otherwise, if that were so, the President of the United States would soon become a dictator, because all he would have to do is have military districts under a declaration of Congress—set it into military districts, [5] and then if he didn't approve of his Judges or Governors or anything else—when I say "his", I mean Governors of States of the United States—he could try them before a military tribunal. There is nothing of that kind here. It is not permitted by the Constitution as I look over it.

My second point is whether it would be proper for your Honor——

The Court: Let us assume that I should find that under the Constitution or the law as set up they had the power to create this tribunal; would the second question be then whether or not they had granted a hearing?

Mr. Andrews: No. We have said that they didn't grant a hearing.

The Court: I mean, suppose that I should hold that the tribunal was lawful.

Mr. Andrew: Yes, your Honor.

The Court: Would the question be in the case then whether or not they had actually granted a hearing?

Mr. Andrews: Yes; whether he had had a hearing as defined by the decisions of the Federal Courts, and especially the Supreme Court.

The Court: All right, go ahead.

Mr. Andrews: And, secondly, whether or not it is proper for the Courts to grant a temporary injunction pendente lite.

My second point is this. We are perfectly willing to [6] go to trial on the merits of this case as soon as your Honor can give us a date. There is no attempt to delay the facts of any kind if we are not stating the facts in our complaint. We are ready to go to trial on the facts. If the Government can find out any other facts that would make our man a criminal that had to be seized for the safety of the community, and the necessity arising therefor, that he had to be, as a military

necessity, and that he had to be immediately taken out, then, if the Court pleases, we are willing to go to trial and hear all those facts and refute them, if we can. So we are not asking for a delay, other than your Honor's convenience in trying this case, and we will be ready at any time your Honor says is a proper time that you could give us a hearing on the facts. Now, in the meantime we don't want our client to disappear, naturally. We have got to consult with him. We have got to prepare. If the prosecution files an answer charging him with any offense of any kind that the military tribunal would, in law, have the right to do, we want to have our client here and, therefore, we are asking for a temporary injunction. Now the question is whether, under the authorities, your Honor can grant such an injunction; whether an injunction can be granted against a Federal official who is violating the law in his own person.

Now, as I say, referring to the facts, there is no proof whatsoever that this man could not be tried if he [7] violated any law of the State or Federal courts; they are open, they are ready to hear all grievances, and no citizen of the United States not in the Military force of the United States or the Naval forces can be tried, if the Court pleases, by any but the Courts of the State. That is set forth not only in the Constitution and in the Bill of Rights, but it is set forth in the decisions of the Courts, which I will come to later.

Then, secondly, has the President any authority to supersede the Federal Courts or the State

Courts, especially his own Federal Courts by setting up a new tribunal which will override them; such as, as I say, if the General in command should feel that for some reason, possibly because I defend somebody that he doesn't like, that I should be put of this jurisdiction, and just order me before him and ask me my name, and say "We have decided to put you out"; can that be done? Because if it can be done with me, a very insignificant member, it can be done with anybody else, any other citizen, including the officials. Now, if that is true, then we haven't got a Democracy here. That is exactly what the Constitution and Bill of Rights prevented, and the Supreme Court has declared over and over again, as I will cite to your Honor in a few minutes.

I understand your Honor has another hearing here, so I am going to be very brief. I am just going to be sketchy, unless your Honor cares to hear me at greater length. [8]

As I say, this man is not in any way connected with Military or Naval forces. He is not tried for an offense against the Military or naval. There is no proof that there is the necessity here for an order from the Military commission or from the President. It is true that an Act was created, I think it is nine thousand——

The Court: Have you a copy of that Act?

Mr. Andrews: 9066.

Mr. Silverstein: 9066?

The Court: Yes.

Mr. Silverstein: Yes, your Honor.

The Court: An extra copy?

Mr. Silverstein: Here is a typewritten copy, and I also have it in the Congressional Service. I have it typewritten.

The Court: Either one.

Mr. Wirin: There is an Act of Congress and an Executive Order, I think it should be clear.

The Court: I want the Act of Congress. This is the Executive Order you are speaking of now?

Mr. Silverstein: Yes.

The Court: I want the Act of Congress.

Mr. Silverstein: Public Law 503?

The Court: Yes.

Mr. Silverstein: This is in 18, 97-A of the Code.

The Court: Title 18, 97-A. [9]

Mr. Silverstein: I have it here, your Honor. Will you pardon me just a minute?

The Court: Is that the second War Powers Act?

Mr. Silverstein: No. This is Public Law 503. Your War Powers Act is different. That is in the Code too.

The Court: Yes. All right. This is Title 18, Section 97, is that it?

Mr. Silverstein: That is Public Law 503. That is in 18, 97-A.

Mr. Andrews: Now, it doesn't matter a rap who this man is, as far as this case is concerned. He might have violated a number of laws. He might have murdered somebody or committed rape or robbed a bank. That doesn't alter the fact that he did not have a trial in appearing before a commis-

sion which under any Act has no power to supersede the State Courts.

Now, the great case, of course, in all these matters is *Ex Parte Milligan*, which was tried in 1864; that is, a military order was issued deporting Milligan, if I remember correctly, and it came before the Supreme Court in 1866 and had a tremendous array of very able counsel there, and it was held that the Military commission, so-called, had no rights whatsoever to interfere with a civilian. Of course it is a very well known case that your Honor knows as well as I do. It is the authority.

We also have another case that came before the Supreme [10] Court a few years ago. The Governor of the State of Texas declared Military law and the seizing of certain properties, and the Supreme Court there set forth at great length a very able decision. I would like to read you short sections from those two decisions.

The Court: I read that last night. I read the Constantin case last night. I haven't read Milligan for some time, but don't read all that now.

Mr. Andrews: Let me read what Chief Justice Chase said: I have extracted a paragraph.

The Court: All right.

Mr. Andrews: "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits"—

In that case absolute charges were made against him, absolute charges, and he had a hearing before a Military commission.

“——and the petition and exhibits in the record which must be taken as true admit his guilt, but whatever his desert of punishment may be, it is more important to the Court and to every citizen that he should not be punished under an illegal sentence than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict even on the guilty unauthorized though merited justice. The trial and sentence of Milligan were by Military com- [11] mission convened in Indiana during the fall of 1864. The action of the commission had been under the consideration of President Lincoln for some time when he himself became the victim of an abhorred conspiracy.”

Then, if the Court pleases, it goes on to say that President Johnson did approve the findings of the commission and it says that he had no right to, and it goes, on, as your Honor well knows, of course, and exonerates Milligan in that case.

Now, then, with your Honor's permission, I will read one paragraph from the case of Constantin.

“The proposition is this: That in a time of war the Commander of an Armed Force (if in his opinion the exigencies of the country demand it, and of which he is to be the judge), has the power, within the lines of his Military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*——” italicized in the decision— “and in the exercise of his authority cannot be restrained except by a superior officer or the President of

the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of these can, if he chooses, within his limits, on a plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, [12] and punish all persons as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis destroys every guarantee of the Constitution and effectually renders the Military independent and superior to the civil power. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in conflict, one or the other must perish”.

Then the Supreme Court goes on to say that, of course, there is no such right for a military officer to do that.

Now, then, if the Court pleases, there are other authorities, but those two, I think, cite the important authorities I would like to call to your Honor’s attention.

Now, then, what can we do? What can the Court do? In *Waite vs. Macy*, 246 U. S., the Syllabus says, the board of general appraisers will be enjoined from enforcing a rule promulgated by the Secretary of the Treasury which necessitates the exclusion of an imported tea, without a hearing

and without a trial. They just excluded them. And it was held that the proper thing was an injunction issued by the Federal Court to stop them from enforcing any such order without a hearing, which the persons who imported this tea had a right to.

In *Work vs. Louisiana*, 269 U. S., the Secretary of [13] the Interior was enjoined by the Courts of Louisiana, relative to the State's prosecution of a swampland claim under a State Act.

The Supreme Court also enjoined the Secretary of War in regard to the dismissal of a fleet of vessels, in disposing of a fleet of vessels in the Philippines. [14]

The Court: Let me ask you this about this case.

Mr. Andrews: Yes, your Honor.

The Court: The plaintiff here, as I read your complaint, received an order that he was to leave.

Mr. Andrews: Yes.

The Court: Nobody came and physically apprehended him to take him away?

Mr. Andrews: Not yet.

The Court: Well,—

Mr. Andrews: No, it hasn't been done.

The Court: Well, they don't threaten to do it either.

Mr. Andrews: Yes, sir; I think we set forth they threaten to do it. He was notified in writing. If we haven't it in the complaint—it has been some time since I drew the complaint. If I remember correctly, he was notified that he must leave by a certain time—or else.

The Court: All right. If he doesn't do that he thereby renders himself liable to a prosecution.

Mr. Andrews: Yes, your Honor.

The Court: For a misdemeanor.

Mr. Andrews: Yes, your Honor.

The Court: That is the only penalty, isn't it?

Mr. Andrews: No, there is a question there as to how far—Suppose the Military do take him out of the State. What are we going to do about it? The law says he must be prosecuted—— [15]

The Court: He can file a writ of habeas corpus. I mean, you couldn't file a writ now, could you?

Mr. Andrews: No.

The Court: Nobody has got him in custody.

Mr. Andrews: I couldn't file a writ.

The Court: Nobody is restraining him of his liberty.

Mr. Andrews: Not yet.

The Court: Has the Military authority said, "If you don't leave we are going to send a squadron of soldiers out and take you"?

Mr. Andrews: I don't think they say it in those words, but they have practically intimated that he is——

The Court: Well, what are the allegations in your complaint concerning this threat?

Mr. Andrews: Yes. I have it right here. About Page 10. Article XIII, on Page 10, Line 19: "The defendants have, since April 14, 1943, enforced and are enforcing said orders at the present time, and they have threatened, and they intend to carry out and enforce said orders and each of them; and will

unless restrained from so doing by order of this Court, carry out and execute each of said orders.”

Now, there is no denial of that.

The Court: Now, wait a minute. That is Page what?

Mr. Andrews: Page 10, Line 19, your Honor, Paragraph XIII.

The Court: Page 10. Now, in the order they direct [16] him to leave, but the only thing the order does which they say that they will execute is to have him appear for fingerprinting and photographing, isn't it? In other words, the point I have in mind,—

Mr. Andrews: I see.

The Court: —as you can readily see, is whether or not you are not previous in raising your questions here.

Mr. Andrews: Yes. Well, I think, your Honor, if there was a writ of habeas corpus, of course we couldn't do it. We couldn't say that we expect them to apprehend him. But I do find, if the Court pleases, in a great many cases that the Courts have permitted the issuing of a restraining order where the other side has taken a step which is absolutely—well, this step is enough to ruin a man itself. He is declared that he is unfit to remain in the State of California by this decision, he can't get work, he can't do anything, he is stopped from his daily occupation, which, under the decisions which I can quote to your Honor if you wish, is a violation of his rights as a citizen of the United States. He is prevented from earning his livelihood because here is

an order ordering him deported. He can't go any further.

Mr. Wirin: Would your Honor permit me to answer that question either now or later?

The Court: It would be pretty hard to restrain you.

Mr. Wirin: Well, you could. [17]

Mr. Andrews: Well, I would be very glad to have Mr. Wirin answer it right here, if he has a better explanation.

The Court: Well, let me see whether or not I have the point in mind. First of all, I don't think there is any doubt about the general proposition——

Mr. Andrews: Yes, your Honor.

The Court: ——The right to create courts to try persons without hearings, summarily or arbitrarily; but it seems to me as though there is a grave doubt about the time to raise this point. This is somewhat comparable to asking me, as a Court—I say “me”——I should say “the Court”——

Mr. Andrews: Yes.

The Court: (continuing) ——to issue a restraining order to direct some governmental agency how to make a decision; not what they shall do, but how they are going to decide a question. If it is permitted to the Military to determine whether a person is or is not dangerous to let within a certain area, they'd make that decision. Then, as I see the scheme set up under the law, within the Constitution, if a man doesn't obey an order which they give him after they have made the decision, he has a right to raise that question as to the validity of the

order, as to the validity of the Board, as to the validity of the law which establishes or attempts to create or establish that Board and that scheme. Then is when he is really hurt. In the meantime it is somebody making a decision concerning the [18] matter, and how can a Court step in and prevent some agency of the Government from making a decision one way or the other?

Mr. Andrews: Because, if the Court pleases, as I see it, the rights of this man have been taken away by the order itself. Let me read you from Page 11, your Honor, of the complaint on that.

The Court: Yes, I am familiar with it.

Mr. Andrews: Yes.

The Court: I remember. I read the allegations and I can see that. Isn't that somewhat comparable—and I have thought a great deal about this in my period of practicing law as a lawyer.

Mr. Andrews: Yes, your Honor.

The Court: Isn't it comparable somewhat to an accusation by a grand jury?

Mr. Andrews: Oh, it is far above that.

The Court: Well, I mean, let us follow it through now.

Mr. Andrews: Yes.

The Court: Somebody is charged by a grand jury with committing a crime. Suppose they are indicted by a Federal grand jury with bank robbery or conspiring to use the mails to defraud, or any one of the offenses which stand forever an accusation against him, regardless of what the ultimate outcome is. He may be acquitted, but between the time

of the accusation and the time of the trial isn't that a brand- [19] ing by the Federal Government that he is unfit?

Mr. Andrews: That is right.

The Court: But isn't that part of the necessary process of preserving this man's right to his trial ultimately?

Mr. Andrews: This man, if he is indicted by a grand jury, which is a form set forth in the Constitution, and they are following then the civil law, that entitled him to an immediate trial. When I say "immediate", I don't mean the day he is indicted. He can come before them and say, "This is all wrong". And that is what we are doing in this case. We are practically moving to quash the indictment, as your Honor would say. We say this order is an order that has been made where they had no right to do it. We move to quash this indictment, as it were. We are bringing this matter before your Honor for that reason, so that he won't be left for the rest of his life——

The Court: You could move to quash it because proper procedure had not been followed.

Mr. Andrews: Yes.

The Court: That is to say, procedures devised to protect the man's rights. But you couldn't move to quash it because the grand jury had decided that he ought to be prosecuted.

Mr. Andrews: No, you couldn't do it on the facts.

The Court: You couldn't do it on their conclusion.

Mr. Andrews: No, if they heard the facts and gave a hearing required by law; but after they have done that, as [20] this Military commission has, they have turned him out as ordered, and he stands indicted before the Court, then we have a right to a hearing.

The Court: Well,—

Mr. Andrews: They might say, "We have ordered you out of here, and we didn't make you go."

The Court: Well, Mr. Wirin has got ants in his pants, using the vernacular, of course. That probably wouldn't look so well when it gets before Professor Frankfurter.

Mr. Wirin: With all due respect to your Honor, the analogy of the indictment, with which Mr. Andrews is in partial accord, does not lie, for this reason. Here there has been more than branding; here there has been more than a holding up to possible obloquy of the defendant; here there has been both the indictment and the conviction and the sentence. Now, why? If your Honor will carry the analogy through, the summons which was served upon the plaintiff to appear before the Military, that was the indictment, and so far as I am concerned I will say to your Honor that probably at that time the defendant in that proceeding had no redress in the Courts; for a procedure having been set up the legality of which is questioned, you have to go through the procedure first before you go to the Courts.

[21]

But after the summons, namely, the indictment had been issued, there was something happened. It

is claimed what happened was not a true hearing and in defense the defendant appears, and then after that an additional step was taken, something else happened, there was a conviction, identical to what happened in court, and after that there was a sentence.

The Court: Was there any order?

Mr. Wirin: Oh, yes, the exclusion order.

The Court: Oh, yes. They said, "Get out", just the same as a Grand Jury says, "Go to trial. Go to jail."

Mr. Wirin: Well, no, the Grand Jury doesn't say "Go to trial." The Grand Jury says, "Something is represented to us to be a matter to be determined." And the Court says, "You go to jail." And when the Court says, "You go to jail," there has been a penalty, so far as judicial procedure is concerned, a sufficient penalty for review by a higher court.

In this case there was the hearing and there was the finding, if you will, by the military tribunal, the jurisdiction of which is challenged. There was more than that. There was exclusion of some kind; there was a sentence imposed and exclusion was ordered, and it says, "You are found guilty. You are now ordered to depart within a certain time."

Let's move just a step further. The order was made by [22] the Lieutenant General, the one man who has the final authority to make the order. There could be no appeal or no representation to the military set-up from this order.

Let's go to another point which I think is equally correct. What is the evil in your Honor's thinking that the only thing that can happen to this plaintiff is that he may be prosecuted for a violation of public law? Now, he may be prosecuted and something else may happen to him, similar to what happened to thousands of persons of Japanese descent, he may be removed physically, may be taken out. There is no particular provision for the defendant being kept anywhere.

The Court: I don't read the order that way.

Mr. Wirin: Now, if you will just also keep this in mind: you may have to read the order that way, for this reason. If General DeWitt's authority is claimed by virtue of the Executive Order, a copy of which Mr. Silverstein has, it provides, if your Honor will read the last paragraph on the first Page:

"I hereby further authorize and direct the Secretary of War and the said military commanders"—that would be General DeWitt—"to take such other steps as he or the other appropriate military commander may deem advisable to enforce compliance with the restrictions applicable to each military area hereinabove authorized to be designated, including the use of Federal troops and other Federal [23] agencies, with authority to accept assistance of state and local agencies."

This Executive Order confers express authority upon the defendant, General DeWitt, to enforce his orders with such forces, including military forces, as

he may deem advisable or appropriate, so they sustain the Executive Order, which is the regular Act of Congress. But that wouldn't make any difference. This order is dated February 19, and the Act of Congress is dated March 5, the Executive Order. I say it is claimed that the authority that General DeWitt has authority to make this particular Order solely by virtue of this Executive Order, this exact Order, confers that kind of physical power on him.

The Court: Order Federal troops, or turn him over to the marshal and let him put him in jail.

Mr. Wirin: I think the military commander has that choice.

The Court: Isn't that when he is hurt? Isn't that actually when he is restrained of his liberty?

Mr. Wirin: Well, now, that is when he is actually restrained of his liberty. But as I understand, the injunction process is available to a person, not when his liberty is actually or already has been restrained, but that is when a writ of habeas corpus is available to him.

The Court: Yes.

Mr. Wirin: But just before that there may be a reasonable [24] likelihood of his being restrained of his liberty and that is why injunction is available at times before habeas corpus is available.

Now, you have here a verified complaint, a complaint which does not recite that the General has told the plaintiff that on a certain day he will take him into physical custody but a complaint which nonetheless does recite an authority upon defend-

ants to enforce this order, whether you have the general authority conferred upon the military commander by the Executive Order to use that physical force and military force, if you will, or not. You have no denial or intimation of denial by the defendants. They come to court and challenge the statement made in a complaint, where, on the statement as it appears, as it might be, there might arise a question of doubt, but there isn't any question in the Wilcox case that the military would not by force physically exclude the plaintiff in that case.

The Court: That was included in the Order though. They were warned, they were told they were going to be gathered up by the Army and held to be put in camps.

Mr. Wirin: In the first instance, your Honor.

The Court: In the first instance they said, "Get out; get out of this territory; all persons of Japanese ancestry get out of this territory. All persons who remain in this area will be gathered up on such and such a date." Isn't that right? [25]

Mr. Wirin: That is true.

The Court: So the step that is now taken is comparable to the first step there in this case, that is, "Get out." Under this case, as I see it, you can't tie up the civil processes which will then be invoked upon him.

Mr. Wirin: Oh, I see.

The Court: I cannot presume, I don't think, that the military authorities are going to forcibly gather up this man and take him out of the jurisdiction of this court, or out of the military, designated mili-

tary area, without any warning, or any further warning, can I?

Mr. Wirin: I think, your Honor cannot presume so, but I think where there is an allegation in the complaint that an order has been made and the defendants are threatening to enforce the order, in the absence of any denial——

The Court: They threaten to enforce the order, but I have a right to think that they will enforce the order according to the law.

Mr. Wirin: According to which law?

The Court: According to the——

Mr. Wirin: According to which law? Executive Order 9066? That is the law that says the military commander may enforce the order by military forces; public law 503 says the order may be additionally enforced by criminal prosecution; this complaint says nothing about a criminal prosecution; this complaint does not enjoin the United States Attor- [26] ney.

The Court: You don't know whether he will be criminally prosecuted, or not.

Mr. Wirin: No. And we are not challenging that possibility. We are challenging the other possibility which they allege in the complaint, under oath, which is alleged by the plaintiff, is not a possibility but is an imminent probability.

Mr. Silverstein: May I interrupt just one minute?

The Court: Go ahead and take your time. I think this is your turn.

Mr. Andrews: I would like to say one more word. I have still one more argument.

The Court: Just one more argument? Let's hear it.

Mr. Andrews: All right. My argument is this, if the Court please: that as far as that military order is concerned, as Mr. Wirin says, that is a definite thing. But I still like your Honor's analogy of the indictment. You cannot go to the Grand Jury and say, "You people made a mistake, and you are entitled immediately to your freedom under the law". Our remedy here is to have a declaration of the court that this man exceeded his authority, this military General exceeded his authority under the Constitution of the United States, and we say he cannot do anything further, he cannot report this man to the district attorney, he cannot escort him with the military forces out of this district, because it [27] is void, and we ask for an injunction on the Order that is set forth in the complaint. I think I have given your Honor the decisions on it. I have them here.

The Court: Yes, I have them.

Mr. Andrews: I won't repeat. That is my attitude, your Honor, in this case. We don't know. We are not in a position to know, if the Court pleases, what else they will do. They have conceded so far that this man has a right to a trial and he says, "These people have put a stain on my name; they have made a threat I am going to be prosecuted; I have been deprived of the liberties I am allowed by the Constitution, by this Act."

And the Court says to General DeWitt—we hope—
“No, you cannot do that. That matter is illegal.
You cannot interfere with the Constitution like
that. You have interfered with him up to now.
You have no final appeal to the district attorney.”
That is my opinion.

Mr. Silverstein: Your Honor, please, may I file
at this time Proclamations Nos. 1 and 2, that coun-
sel are familiar with?

The Court: Yes.

Mr. Silverstein: And the letter of February 20,
1942, an excerpt, from the Secretary of War to
General DeWitt, and the letter of June 15, 1942?

The Court: All right.

Mr. Silverstein: You are familiar with these
and I would like to introduce them. I am sure they
will shed some light. [28]

The Clerk: Are these offered as exhibits?

Mr. Silverstein: Exhibits 1, 2, 3 and 4.

The Court: Very well.

(The documents referred to were marked as
Defendants' Exhibits No. 1, 2, 3 and 4 and
were received in evidence.)

Mr. Andrews: We want to call your Honor's
attention to the fact there is nothing, no plea has
been made on their authority whatever, but they
have been called to our attention in this case.

Mr. Silverstein: You are familiar with them?

Mr. Andrews: Mr. Wirin is probably familiar
with them. I don't care whether we are familiar
with them or not. You have not the right to set

aside the Constitution or the law, or the Act of Congress, by any letters.

Mr. Wirin: All these matters deal with the Act of Congress which we say is not in issue at all at this time. We are not challenging the Act of Congress; we are not alleging any threatened prosecution under that Act. All these matters pertain to the circumstances surrounding all this.

Mr. Silverstein: You question the authority of General DeWitt and this letter of authority, under 9066. That is what his authority is.

The Court: You are offering these on the basis the Court can take judicial knowledge?

Mr. Silverstein: Yes, and as a part of my argument on the record, we have a right to offer such matters. [29]

The Court: Only those matters of which I can take judicial notice.

Mr. Silverstein: Yes, that is true.

The Court: If you want to offer them as a matter of argument, you can offer anything.

Mr. Silverstein: Is there any objection to them? We offered the same matter in the other cases.

The Court: I will take judicial knowledge of them.

Mr. Wirin: You could take judicial knowledge of them.

The Court: Yes, I will take judicial notice of them.

Mr. Silverstein: Now, if your Honor please, I think the question that is before the Court has been expressed by your Honor.

The Court: By the way, let's dispose of your motion to strike first, shall we?

Mr. Silverstein: Yes.

The Court: You have a motion to strike here, so we will see what is left of the complaint.

Mr. Silverstein: Our motion goes to the damage feature and I have authorities here——

The Court: You have stricken the second cause of action?

Mr. Silverstein: But there are certain allegations of damage in Count 1.

The Court: I couldn't find your item "B-1." You say, "to strike from Line 23 of Paragraph II, on Page 2, beginning with the word 'plaintiff' to the word 'profession' on Page 4." [30] I see.

Mr. Silverstein: Yes.

The Court: Page 4 of what?

Mr. Silverstein: Of the complaint.

The Court: This is Line 20. I see where it is now. That will be denied. That is Item "B-1", Mr. Clerk. That is denied.

Paragraph 4 of Page 6?

Mr. Silverstein: No.

Mr. Wirin: May I address the Court for one moment, as to the theory or reason why matters apparently——

The Court: When I get to it. No. 2 is denied. 3 is denied. 4 is granted partially. Beginning with the words "that the order of exclusion" in Line 17, to the end of the paragraph, is granted. Do you find it?

Mr. Silverstein: Yes, your Honor. State that again.

The Court: That is Page 8, Paragraph 9, beginning with the words on Line 17, "that the order of exclusion referred to as Exhibit F"—that is granted. That is stricken to the end of the paragraph.

No. 5 is denied.

Mr. Wirin: May I have a word as to that, your Honor?

The Court: 5?

Mr. Wirin: Yes.

The Court: I have denied his motion to strike it.

Mr. Wirin: As to 6? [31]

The Court: 6 is denied. All right. Do you want to be heard on that?

Mr. Wirin: Yes. My understanding of the state of the law with respect to the authority of Federal authorities to issue release is this: that there must be in controversy an amount involving \$3000 or more. While there is no challenge on the matter at least, your Honor, at this time, I think there should remain in the pleading the allegation as to damage, an allegation as to the amount involved to disclose that it is in excess of \$3000, else the Court would not have any jurisdiction to entertain the proceeding at all. If only for that premise, not for the purpose of supporting a judgment or claim for damages, that this matter, I think, is properly in here.

The Court: What have you to say to that?

Mr. Silverstein: As to the damage, your Honor?

The Court: He says in the first cause of action, that is the one for injunction, that it is necessary to establish jurisdiction that an allegation be made as to the value of the rights which are threatened to be injured, and this allegation is an allegation that the value of his rights exceed \$3000. I don't think so. I think it is an enforcement of the Federal law. I don't know where else you would go but to the Federal court.

Mr. Wirin: We have had a lot of difficulty about that. There are cases—— [32]

The Court: I know, pro and con.

Mr. Andrews: It might be unnecessary, but if the Court please, it is an allegation of jurisdiction and as such we respectfully submit it should not be stricken.

Mr. Silverstein: I feel the damage element should be entirely stricken out. I think the authorities show it, and there is no reason because you have set it up, as you have in the pleading, that it should be there because the law is one way; there are agents of the government and acting in due course, under authority, and the matter of damages has no place there.

The Court: It is stricken, all of the claims for damage. This is similar, as I recall it, to a New Hampshire case where they tested some ordinance requiring a license for a man to do business, and the court held he had to allege that his right to do business was worth more than \$3000 before the complaint stated the cause of action. And, as I

remember the case—I haven't read it now in a long time—they held it didn't state a cause of action because he did not have an allegation that his right to do whatever it was—I think it was to deliver milk—exceeded \$3000.

Mr. Silverstein: Then the section on the damage feature is stricken?

The Court: It is stricken. And you have amended your [33] complaint to eliminate any prayer for damages?

Mr. Wirin: Yes, your Honor.

The Court: 7 will be denied then. By the same token 8 will be denied. 9 and 10 are granted upon the motion of the,—

Mr. Andrews: They are not at issue now. Your Honor, they are dismissed.

The Court: Now, upon the prayer, Paragraph 4 will be stricken.

Mr. Andrews: Yes, your Honor; no objection to that.

The Court: All right. Paragraph 4 of the prayer is stricken on motion of the plaintiff. All right. The Complaint remains substantially as it was.

Mr. Silverstein: May I have time for consideration of one of the facts after I finish my argument?

The Court: Yes.

Mr. Silverstein: May I proceed then with the argument?

The Court: Yes.

Mr. Silverstein: If your Honor please, I have offered as an exhibit before your Honor this Order

9066. Your Honor takes judicial notice of those exhibits. Now, 9066 was backed up by Public Law 503, which is the criminal statute to which I have called your Honor's attention, and to 1897-A. Of course it is an element, so I don't want your Honor to feel that it is, as such, a prosecution of 503 or 1897-A. There is a limit and I don't want your Honor—— [34]

The Court: There is a limit?

Mr. Silverstein: I mean the powers of the military commander would not be limited to the prosecution under Public Law 503 known as 1897-A.

The Court: Yes.

Mr. Silverstein: Using that, your Honor, the argument which will be made before your Honor will be that they have failed to state a cause of action here, for the reason that, primarily, the court has no authority to interfere with the discretionary power, so-called, of the military commander. In this instance the authority to the military commander being brought about from the Secretary of War, and to the Secretary of War from the Commander in Chief, the President of the United States, under war powers which have been granted to the President. Now, throughout——

The Court: Just a moment. Let me understand. If I comprehend your position correctly then, your position is that as a consequence of the fact that this Order is not necessarily a criminal prosecution, it may be that General DeWitt or the Commanding General will send a bulletin down and take hold of him and carry him out of the district?

Mr. Silverstein: I say that it is not limited to the criminal prosecution, in all fairness, yes.

The Court: Under the present Order your position is that the Commanding General has that power?

Mr. Silverstein: Yes. That is, certainly I don't want [35] to state to the Court that it is limited to a criminal prosecution, but the Order refers to the authority of the Commanding General here and says he cannot be prosecuted for the violation of Public Law 503. But don't get away from this, that in this record he is not charged with a criminal matter. I say he has been given a hearing, as provided; that he has been held. And my thought to you is this: under the law, and I will cite the authorities that I believe uphold my argument in this record, when an officer or agent, in this instance, or any others of the Western Defense Command—General DeWitt—was given authority to act as he did, that the Court should not say, "No, General DeWitt, you acted wrongfully. You did not use the proper discretion, but I, sitting as a judge, would have acted differently."

The Court: They are not claiming that.

Mr. Silverstein: Oh, yes.

The Court: They didn't have a hearing.

Mr. Silverstein: Oh, yes, they are. They have no right to be here under any circumstances, unless they can show this is the proper tribunal in which to proceed.

The Court: They have alleged that.

Mr. Silverstein: They have alleged it, if your Honor please.

The Court: That must stand as a fact because it is undenied. [36]

Mr. Silverstein: But, if your Honor please, it goes further than that because the factual matters and the law that goes with the factual matters, takes it out of that sphere entirely. That is what I am trying to impress upon the Court.

The Court: All right. Go ahead.

Mr. Silverstein: That is the only way they can come into this Court under any circumstances. And then I say it would not apply because we have a war situation here. The same state of facts that would have existed before the declaration of war would be interpreted entirely differently, and should be interpreted entirely different by the Court than the state of facts that existed when there is a declaration of and war conditions. I hope I have made myself clear, that if this set of facts existed without war, then there would be an entirely different situation. But we have a war power, and we have the authority of the Secretary of War, and the Commander-in-Chief, the President. Your Honor cannot assume at all, and, in fact, if you did assume it would have to be in favor of General DeWitt.

There is not anything before your Honor that shows that he knew this man Alexander at all. Therefore, certainly your Honor cannot assume that he has taken an arbitrary attitude towards this man. Your Honor cannot assume that capricious-

ness has shown itself, because then your Honor would have to take the reverse to any Chief or Commander of the Western District here of the Armed Forces who is acting [37] for the one hundred and thirty-six some million people. And while Mr. Alexander is an individual under the law, even though he has been hurt perhaps to some extent, he must give in to the good of the others concerned.

The Court: I think, counsel, and I don't say this with any definiteness, but it strikes me that the scheme set up by Congress that the Commander has the power to have a hearing and decide, and then if a man does not obey, he is subject to prosecution, is within the Constitution. I am not at all impressed with the proposition that the Commanding General can have a hearing, such as is described in his verified petition, and then, if a man does not obey the Order, can take him up and take him out of the district.

Mr. Silverstein: I am not saying what the Commander is going to do.

The Court: Of course, they want him restrained somewhat now.

Mr. Silverstein: All right.

The Court: You have said that you don't wish to bind the Commander, but he has the power if he desires.

Mr. Silverstein: I haven't any right to bind the Commander or the General at all.

The Court: All right.

Mr. Silverstein: I am speaking as a matter of law. [38]

The Court: I understand. Your position is as the Order stands the Commanding General can come into this court room and take a squad of soldiers and take this man and move him right out. That is your position.

Mr. Silverstein: Under the authority of the Order. It says he will be liable to prosecution by Public Law 503.

The Court: But if he is only subject to prosecution by Public Law 503, then he is entitled to remain here at his peril, at his peril of being prosecuted, the same as any man who refuses and refuses, at his peril of being prosecuted.

Mr. Silverstein: One part of the Order is "Failure to comply with the foregoing will subject you to criminal penalties under Public Law 503, approved March 21, 1942, with respect to persons who enter, remain, and leave, or commit any act in any military area or zone."

That is all before the Court at this time.

The Court: All right. If that is all that is before me——

Mr. Silverstein: That is all that is before the Court, but there is another matter and I say that so far as the authority that is given under Executive Order 9066, a military commander may have that other authority that is not before your Honor at all at this time.

The Court: Then why discuss it?

Mr. Silverstein: They brought the matter up and I didn't want to state something to the Court

which I didn't feel was [39] fair to state to the Court. That is all.

The Court: As I stated during the course of plaintiff counsel's argument, it seemed to me there was no effort made that he should be physically removed from this district.

Mr. Silverstein: There isn't anything that has been done here.

The Court: And the authority is if he doesn't obey the Order he will be subject to the penalties of the laws enacted by Congress. I don't know, but I think, counsel, that there is no use in discussing further whether or not General DeWitt has the power to physically take the man.

Mr. Silverstein: That is right. That raises another issue.

The Court: That is not before me. If it is before me, I will issue an order restraining him. If that is now before the Court, I will issue an order restraining the Commander General from physically removing this man from this district, but it does not seem to me that it is before me.

Mr. Silverstein: It is not before you and I don't want to be bound by anything that is not before the Court whatsoever. You admit that the man is here, do you not?

Mr. Wirin: We will keep him here.

Mr. Silverstein: I didn't ask you that. I asked you if you would admit that the man is here.

Mr. Andrews: He is here.

The Court: That being the case I don't think there is [40] anything else before the Court. It

seems to me that the only thing is that the law will be obeyed. I don't think they are entitled to a preliminary injunction on this Order.

Mr. Wirin: May I address the Court and address a question to Mr. Silverstein through the Court?

The Court: Yes.

Mr. Wirin: Is Mr. Silverstein's position in court, and for the record, as counsel for the defendants, that there is no intention on the part of any of the defendants physically to remove him?

The Court: His position is they have a right to that, but his position further is, as I understand it, that it is not now threatened.

Mr. Wirin: Is that his position?

The Court: Is that your position?

Mr. Silverstein: My position is this, your Honor, that they have that authority if they care to exercise it.

The Court: Is it your position under this Order that it is threatened?

Mr. Andrews: That has been.

Mr. Silverstein: Your Honor, I don't know how far you feel I should go.

The Court: Well, I want to know what your legal position is.

Mr. Silverstein: I have stated it.

Mr. Wirin: And we want to know. [41]

The Court: They say you have alleged the authority to use physical force.

Mr. Wirin: By virtue of the authority conferred upon the Commander by the Executive Order.

The Court: Is it your position and do you concede that the Commanding General has threatened to remove him by physical force?

Mr. Silverstein: He has issued the orders that appear here.

Mr. Wirin: All we want is some protection against that.

Mr. Silverstein: I know they do. I would like to argue this matter a little further. I think I can overcome any of these matters here that counsel have urged.

The Court: I am trying to decide it in your favor.

Mr. Silverstein: I know that you are, but, your Honor, at the same time you are endeavoring to place me in a position here where you want me to state something that I don't feel is before the Court.

The Court: It certainly, most assuredly, is before the Court, and that is whether or not there is a threat to physically remove this man by the Commanding General.

The Court: No, you say he has that power. Now, is it your legal position that this Order is a threat of physically removing him? That is what [42] I want to know. If it is before the Court I will issue a restraining order restraining the Commanding General.

Mr. Silverstein: Without any further hearing or argument on the authority?

The Court: Let's first decide whether or not it is your position. If it is not your position, then there is no use in your arguing.

Mr. Silverstein: I don't know why your Honor should—may I say this—put me in that position, when the Order is before the Court, and it is an exhibit here. Your Honor can grant this. But as to what it constitutes or what it does not constitute, I think that is a matter for the Court to determine.

Mr. Andrews: Your Honor, we say despite any limitation of the Order, we are under this Executive Order, and we say now that no matter what was said about doing this to our man, the District Attorney says, "He can do it, if he wants to."

Mr. Wirin: We say it under oath, and it is undenied.

The Court: You say it according to this. This is your authority. It doesn't seem to me I can read anything into this Order that is not here.

Mr. Wirin: No.

The Court: Apparently, the District Attorney feels he is restricted in his authority to make any decision.

Mr. Silverstein: I am only restricted, your Honor, as [43] a matter of law. From what appears before the Court, I claim they have no right to a temporary injunction. I am here to resist that, and am here to have stricken everything so far as damages are concerned. Your Honor has ruled to some extent on the motions. Now I say that they are not entitled to an injunction under any circumstances, and I think the law is all one way on it. As to the temporary injunction, I don't think there is any law that they can produce. [44]

I say that the only way they can come here under

any circumstances is under the Fifth Amendment. With reference to the Fourteenth, that applies to the States and the equal-protection clause isn't there. I say that where the personal liberty is concerned, let them show one case where an injunction has ever been granted under that Fifth Amendment of a similar nature or anything pertaining to it. I say that the law that I have and I can cite to your Honor is all one way in that regard, in my favor.

Now, the issue has come up here as to whether the Military—Whatever I would state your Honor knows I would definitely abide by.

The Court: I know that.

Mr. Silverstein: And that is the reason I am very careful what I am agreeing to. I have no authority over the Military, as your Honor knows. I am appearing here for General DeWitt, acting as counsel because he is sued in here as one of the defendants, and for Mr. Hood, of the F. B. I., who is head of the F. B. I., as your Honor knows. Now, it is my opinion, your Honor, at least from what appears here, as to what should take place later, it would be something to come before the Court.

The Court: Is it your opinion that this order here is a threat to remove him physically?

Mr. Silverstein: It prohibits him from being here.

Mr. Wirin: It tells him to get out and stay out.

[45]

Mr. Silverstein: It tells him to depart, and then it says "Failure to comply will subject you to the criminal penalties."

The Court: It looks to me like that is all he has threatened to do. I don't think he has threatened to do any more, counsel.

Mr. Silverstein: I don't care to go any further.

The Court: ——"and subject you to the criminal penalties".

I don't want to cut you short on your argument, but I mean there is no use in either you discussing the matter or my considering it if there is no threat to use physical force. That is all that the Military Commander has spoken.

Mr. Wirin: May we have there just a word about that, your Honor?

The Court: Another one?

Mr. Wirin: Two or three words.

The Court: All right.

Mr. Wirin: We don't think that you should limit yourself in determining what may happen to this plaintiff merely in terms of the order itself.

The Court: Oh, I can't decide a controversy that is not before me. I mean howsoever much I would like to speculate on the rights and privileges of people, I can only decide this litigation, and the only question that is litigated here is what the Commanding General has threatened to do. [46]

Mr. Wirin: Now, the plaintiff, as I said, in his verified complaint, says there is a threat to enforce this order by a physical ouster. Now there is no assurance or even statement to this Court by counsel for the defendants that the action to be taken by the Military Commander is to be limited to a prosecution under 503.

The Court: Well, I can understand that. The United States Attorney acts as attorney for the Departments, he does not act as their director, and having occupied his position I know that he is limited in making any commitments concerning what is in the mind of some other department to do. But now the only demonstration of what they intend to do is "failure to comply" will subject him to the criminal penalties of that law. Then he will have his day in Court. Then he will have his opportunity to test the validity of the Executive Order, of the Act of Congress, of the Proclamations No. 1 and 2, the letter of Stimson, and so forth. It seems to me that that is the time. I don't know—I certainly can sympathize not only with this plaintiff but with every other person who is charged with crime, before they are convicted. I mean, surely it is not any different than making a report. The governmental agencies that prosecute for offenses follow the policy of keeping them confidential, but there is not any law particularly that requires them. I mean suppose the F. B. I. made a special report on the Post Office Department and somebody would be hurt just as [47] much.

Mr. Wirin: May I just inquire, is it your Honor's interpretation or construction of the pleadings before the Court and the statements made by counsel for the defendants that there is no threat of or immediate danger of any physical removal of the plaintiff from this area?

The Court: That is the way it appears to me now.

Mr. Wirin: That is the only relief we are asking. Now, if there were that assurance, by the judicial requirements of the state of the pleadings and statements of counsel, then we agree with the Court there is no warrant for issuing any injunctive relief.

The Court: I don't think your complaint states a cause of action for that reason. I don't think there is anything here. If there was a threat that he was going to physically remove this plaintiff from this jurisdiction or from his home or from a Military area, then I think you would have something that would now be before the Court, but all he is threatening to do is to enforce the law, the Act of Congress; that "if you don't do this", why, then it is up to some other department of the Government.

Mr. Wirin: But there is the allegation in the complaint, after a recital of the order and its terms, that the defendants threaten to enforce the order.

The Court: Well, I think there has to be more than that, Mr. Wirin, I mean just a mere conclusion that they [48] threaten to enforce the order. The manner of enforcement is indicated.

Mr. Wirin: But it is not an exclusive manner.

The Court: If you had alleged that he had seen General DeWitt or Captain So-and-so, or Major This, or somebody else, and they had told him, "We are going to physically remove you from the district", then there might be something further; but here is a mere allegation of threat.

So I think that the motion to grant the injunction pendente lite will be denied. As a matter of fact,

I think that I am compelled under my view to grant the motion to dismiss until there is some physical threat shown, and the motion to dismiss will be granted.

I suppose there will be a judgment for dismissal prepared on this. I imagine that the plaintiffs will probably want to take proceedings for appeal as expeditiously as possible.

Mr. Andrews: Well, your Honor, if your Honor's interpretation of that law is the same, that is all we want. We want the man to stay here until there is a proper order.

The Court: Well, I don't know. It isn't before me. It may come before some other Judge. The District Attorney says he hasn't had a chance to argue it, and maybe if he does have a chance to argue it and there is a physical threat he might be able to change my mind.

Mr. Andrews: He won't be able to change ours, with [49] all due respect. But, if the Court pleases, I haven't consulted with other counsel, but I doubt very much if we will go any further on this line, because your Honor's interpretation of the matter is exactly what we hoped is the law.

The Court: The only point I have in mind is I was going to suggest that there should be a prompt preparation of a judgment,—

Mr. Andrews: Yes, your Honor.

The Court: —so that if you desire to appeal and prosecute the matter further, you can.

Mr. Andrews: May we present the—

The Court: These matters are continually arising, they are exceedingly important not only to the safety of the country but to the welfare and the rights of citizens, so it might be well—I would like to see something get up to the higher Courts as quickly as possible.

Mr. Andrews: Well, if it is your Honor's suggestion and it is agreeable to the District Attorney, we will prepare an order and submit it to the District Attorney and your Honor.

The Court: Very well. You were about to say something, Mr. Silverstein?

Mr. Silverstein: No, I think I won't say anything more.

The Court: All right. I think these belong to the District Attorney. [50]

Mr. Silverstein: No, I was going to leave this with the Court, I mean if you want it.

The Court: You had better take it. I will get it again.

[Endorsed]: Filed Oct. 18, 1943. [51]

[Endorsed]: No. 10514. United States Circuit Court of Appeals for the Ninth Circuit. Kenneth Alexander, Appellant, vs. Lt. General John L. DeWitt, Commanding General of the United States Army of the Western Defense Command and Fourth Army, and R. B. Hood, Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 23, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

